national law, international law is a co-ordinate body of law.[63] Under the transformation one, the courts confer validity and legitimacy on those precepts as (municipal) law, because the courts are organs of government: they are part of the *trias*. This is where *Trendtex* trenches most clearly on the separation of powers.

Perhaps fortunately, the constitutional questions which *Trendtex* raised were rendered largely moot—at least in terms of state immunity—by decisive and clear parliamentary action in the form of the State Immunity Act 1978. This Act, modelled on the European Convention on State Immunity 1972, codifies into UK law the restrictive theory of sovereign immunity. Thus, when a case on the very issue of the restrictive reading to immunity came before the House of Lords in 1983, the Law Lords could claim for the common law the restrictive theory.[64] The proceedings in *The Playa Larga v The Il Congreso* had arisen during the *Trendtex* hearings before the Court of Appeal, relating to events that spanned the timeframe of those in *The Philippine Admiral* and in *Trendtex* (1973–1975). The House accepted for UK common law the rule as stated in *The Philippine Admiral*, relating to state-owned trading ships, and as developed in *Trendtex*, concerning all commercial matters involving state entities. The Law Lords did not, however, endorse Lord Denning's construction of incorporation and transformation, nor its ramifications.[65] At its highest, the House left the matter open.

When the next challenge to sovereign immunity appeared, in the form of the impact of the 1984 International Convention against Torture,[66] the majority in the House of Lords dealt with the question in its statutory context.[67] In London for medical treatment, former Chilean Head of State Augusto Pinochet was arrested in 1998 pursuant to the Extradition Act 1989. An international arrest warrant had been issued from Spain, alleging conspiracy to murder, attempted murder, torture, conspiracy to torture, and conspiracy to take hostages, all on multiple occasions and all between a period of January 1972 (before taking power) and January 1990 (shortly before stepping down). Pinochet claimed immunity under the State Immunity Act 1978 in the extradition proceedings. Under the Extradition Act, only those crimes punishable in the UK could form the basis for a valid extradition order.

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[63] See also Lord Hoffmann in *Jones v Saudi Arabia* [2007] 1 AC 270, p. 306: "… state immunity is not a "self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt" and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another." (quoting in part Lord Millett in *Holland v Lampen Wolff* [2000] 1 WLR 1573, p. 1588).

[64] *The Playa Larga v The I Congreso del Partido* [1983] 1 AC 244.

[65] *The I Congreso*, pp. 261–2 (Lord Wilberforce) (accord Lords Diplock, p. 272; Edmund-Davies, p. 276; Keith, p. 277, and Bridge, 278).

[66] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 65.

[67] *R v Bow St. Met. Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147. *Ex. p. Pinochet (No. 1)* [2000] AC 61 regarding the immunity question was set aside by *ex. p. Pinochet (No. 2)* [2000] 1 AC 119 on the grounds of a perception of bias, because of one of the Law Lords in *ex. p. Pinochet (No. 1)* was an unpaid director and chairman of a charity wholly controlled by Amnesty International, an intervenor against Pinochet in that first case.

Given the UK law on hostage-taking, this narrowed the range of potential extradition offences to those relating to murder and torture. For the charges relating to murder, these fell within the provisions of State Immunity Act.[68] The principal dispute was the availability of immunity in the face of the 1984 Torture Convention. Extraterritorial torture had become a crime punishable in the UK by September 1988 under s. 134 of the Criminal justice Act 1988, passed in part to give effect to the provisions of the 1984 Torture Convention. Whereas both Chile and Spain had ratified the Convention by October 1988, UK ratification occurred only on 8 December 1988. Since it was the Convention which established the necessary jurisdiction (including the further restrictions on the availability of immunity for state officials), the majority[69] held that the relevant date on which immunity from prosecution for torture offences was lost by all state officials, including Pinochet, was 8 December 1988, rather than the earlier date in September. For Lord Goff, the clear lacuna of an express term in the Convention removing the cover of state immunity for allegations of torture, and the need for its consequent implication *sub silentio* in Convention terms, were grounds to dissent from the majority. For Lords Millett and Phillips, sovereign immunity could not and did not cover acts of torture at all (nor of conspiracy to murder in Spain).[70]

All of the speeches, save the concise one of Lord Saville, reviewed in varying levels of detail the international state of play concerning acts of torture, crimes against humanity, and *ius cogens*. The speeches also made reference to relation of the State Immunity Act and s.134 of the Criminal Justice Act 1988 to international law. Yet as the sketch above shows, when pared down to essential propositions, the reasoning and mindset of the House of Lords remained squarely within the framework of legislative prompts and the constitutional optic. Hence the relevance of the UK ratification of the Convention, as a signal concerning the appreciation of state sovereignty by the relevant constitutionally prescribed organ. This observation applies to the minority as well. For Lord Phillips, the required approach was an interpretation of the State Immunity Act consistent with the UK's obligation sunder (developing) international law. For Lord Millett, even s. 134 of the Criminal Justice Act was not necessary: English courts supposedly "always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law" because customary international law is part of the common law, which supplements the criminal jurisdiction of the English courts.[71]

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[68] Specifically s.20(1) which incorporates by reference the Diplomatic Privileges Act 1964, which in turn incorporates a number of Articles of the Vienna Convention on Diplomatic Relations 1961 (including Article 39 on immunities).

[69] Lords Browne Wilkinson, Hope, and Saville. Lord Hutton considered September 1988 as the relevant date.

[70] Yet see *Arrest Warrant of April 11 2000* (Congo v Belgium) ICJ Reps 2002 3 (serving head of state may claim immunity in proceedings for crimes against humanity).

[71] *Ex p. Pinochet Ugarte (No. 3)*, p. 276 (*contra: R v Jones (Margaret)* [2007] 1 AC 136). This also ties into his finding there that the Torture Convention merely redefined an extant international crime, and did not create one.

The next attempt to limit sovereign immunity, *Jones v Saudi Arabia*, did not wield international law directly against the State Immunity Act.[72] In that case, a number of individuals sued the Kingdom of Saudi Arabia and certain Saudi officials for damages as a result of their systematic torture while imprisoned there. The Saudi State claimed immunity under the Act, highlighting that no exception thereunder existed for civil claims arising out acts torture. Recognising this, the claimants instead framed their case under the Human Rights Act, arguing that to give effect to immunity from civil claims against torture represented a restriction on their right to access to a court that was neither a legitimate objective nor proportionate given the *ius cogens* character of suppressing and remedying acts of torture. Hence (customary) international law could bear upon the nature and scope of rights conferred by the Human Rights Act, which in turn empowered the courts either to read that further narrowing of immunity into the statute or to make a declaration of incompatibility. In delivering the judgment of the House rejecting this argument, Lords Bingham and Hoffman found no clear general acceptance in international practice or materials of holding states and their officials civilly liable for acts of torture. Foreign cases, including those of the US courts, the ICJ and the ECtHR, did not establish such international practice. Nor did the 1984 Torture Convention, nor the proposed 2004 Convention on Jurisdictional Immunities of States and their Property. Unlike the situation for criminal liability, in light of the 1984 Torture Convention, no equivalent existed for civil liability. The claimants had not made out a proposition central to their claim.

It should be noted, however, that in the House, in both speeches no issue was taken with pursuing an argument based on international law through the provisions of the Human Rights Act. That is to say, international law may delimit or inform and individual's rights against a state, which impact is adopted by a treaty, the EConvHR, which in turn is incorporated by reference into UK municipal law by a statute. On its face, the logic appears sound. The treaty is an instrument of international law, and would confer rights directly upon individuals. It can respond or adjust to changes in international law—it is assumed without argument.[73] These make their way in the domestic legal order by virtue of incorporating by reference the treaty itself. Hence the legislative cue (of the Human Rights Act) would signal a clear expansion of the relevant sources for interpreting the law. Nevertheless, for the separation of powers, we remain within the sphere of legislative direction, of the powers of the Legislative Branch to make law.

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[72] *Jones v Saudi Arabia* [2007] 1 AC 270.

[73] *Holland v Lampen Wolff* [2000] 1 WLR 1573 (HL): in reconciling obligations of international law with those of the EConvHR (viz. sovereign immunity and the Article 6 right to a hearing), those of the treaty had to interpreted within the context of international law: international law precedes treaty rights. Hence, any right to a hearing had to take into account sovereign immunity.

4.3.3 The External Perspective: The Limits of Sovereignty

Whereas *R v Keyn* and *West Rand* hold that customary international law, and international law more broadly, cannot expand or legitimate *in se* such legal powers or obligations and duties not otherwise sanctioned or originating in the Constitution, the flip side to this coin is that (customary) international law can check, or delimit, a state's jurisdiction where it would seek to push its powers beyond the natural, national frontiers, unless express intended as such.

The courts are bound by the terms of legislation, even if contradictory to what otherwise would be acceptable in customary international law. In the interpretation of statutes, the courts will presume that Parliament intends to exercise a jurisdiction no broader nor more extensive than the limits established "by the common consent of nations": *Cope v Doherty*.[74] That is, the courts will assume that legislation is intended to affect only the rights and duties of those within its territorial boundaries, and only British subjects thereout.[75] But the presumption will give way in the face of a clearly expressed intention to go beyond the ordinary purview.[76] Hence the American ship-owners could not invoke the UK Shipping Act 1854 to limit or qualify damages (to the value of their ship and its cargo, rateably) arising out of a collision on the high seas and payable to other American shipowners and cargo owners, even though the UK Court of Admiralty had given a final judgment holding the former liable. Likewise, the House of Lords in *Cooke v Chas. Vogeler Co* would not expand by interpretation the reach of the Bankruptcy Act 1883, by construing "debtor" absent clear words to the contrary to reach beyond a debtor subject to the law of England.[77] Two citizens of the US who traded in England through an agent, but who themselves had no residence in the UK, did not qualify as "debtors" committing acts of bankruptcy under the Act, even though they had made an assignment in bankruptcy in the US.[78]

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[74] *Cope v Doherty* (1858) 44 ER 1127 (CA).

[75] See also *Cox v Army Council* [1963] AC 48, *R v Jameson* [1896] 2 QB 425—territoriality presumption for criminal law statutes; jurisdiction over offences committed by foreigners abroad requires clear, certain language.

[76] *The Zollverein* (1856) 2 Jur NS 429 (per Lushington J).

[77] *Cooke v Chas. Vogeler Co.* [1901] AC 102; *Ex p. Blain* (1879) 12 ChD 522 (CA).

[78] Unlike *Theophile v The Queen (Sol. Gen.)* [1950] AC 186 where a bankruptcy petition was granted against a trader then resident in Eire, but who had resided and carried on business in England, generating the tax liabilities which remained owing and unpaid after (but assessed before) he had disposed of his business and moved to Eire. And see also *In re AB & Co* [1900] 1 QB 541 (CA).

4.4 The United States: It's Academic, Really

Whereas the objective in examining the UK situation was to tease out the constitutional presuppositions at work in the judicial application of customary international law, the constitutional facet is front and centre in the US situation. The Constitution plays an obvious and determinative role in structuring the judiciary's approach to customary international law. Separation of powers concerns generally resolve themselves into two primary categories. These reflect the horizontal and vertical separation of powers characteristic of the US. The first addresses the law-making power of the federal judiciary. The first branch to this pertains to the judicial-legislative axis, and the degree to which the application of customary international law may require the courts to supplant or supplement otherwise valid legislation. In other words, is customary international law an independent source of binding federal law for the US? Its second branch pertains to the judicial-executive axis, and how far customary international law may draw the judiciary into the foreign affairs domain and political questions. The second category for concern addresses the federal division of powers, in particular, the pre-emption of state law by customary international law applied as federal law. Underlying these various issues is the central, constitutional question of the valid and legitimate basis upon which customary international law forms part of the US legal system. Put shortly, it is a question of locating in the constitutional arrangement the rule of recognition.

4.4.1 Recognising the Rule

The task of situating that rule is joined principally on the academic level. The significant and substantial debates on the place and legal force of customary international law within the US legal system are generally framed in terms of the nature and scope of federal common law.[79] This arises in the wake of two Supreme Court's decisions. The first is *Erie Railroad v Tompkins*, a case sitting entirely within the context of domestic federalism.[80] It concerned the law governing the liability of a New York railroad company for personal injury sustained on its right of way by a Pennsylvania resident in Pennsylvania. According to the practice regarding diversity jurisdiction at the time, the federal court relied on neither New York law nor Pennsylvania law, but rather "general common law". The Supreme Court rejected this as a constitutionally prescribed source of law, holding (in part):

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[79] To provide a recent selection, see, e.g., Bradley and Goldsmith 1997a and Bradley and Goldsmith 1997b; Neuman 1997; Stephens 1997; Koh 1998 and Bradley and Goldsmith 1998 (in response); Paust 1999; Young 2002; Ramsay 2002; Aleinikoff 2004; Bradley et al. 2007, and Ginn 2008. These proceed primarily from a definition of the issues by Bradley and Goldsmith 1997a. See also the earlier works of Franck 1963; Lillich 1970, and Trimble 1986.

[80] *Erie Railroad v Tompkins* 304 US 64 (1938); see Young 2002, p. 407ff.

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state…. And no clause in the Constitution purports to confer such a power upon the federal courts…. We merely declare that in applying the doctrine this court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.[81]

The immediate consequence was to commit the federal courts to applying state law in most commercial and civil matters, save where the Constitution reserved the matter expressly or by implication to Congressional legislative authority. It did away with the idea that the federal courts had a general power to make (or recognise) law, unanchored in any identifiable constitutional grant of power. The wider implications for cases with international elements, handled by the federal courts, were immediately recognised by Jessup, but did not attract attention until some 25 years later.[82] That is, a strict reading of the *Erie* doctrine might suggest that state lawmakers (including the courts) might have a gained definitive voice in US foreign relations, since any state rulings on international law would be unreviewable by federal courts, the Supreme Court included.

A second case reignited speculation on the point. That case was *Banco Nacional Cuba v Sabbatino*, in effect an interpleader action.[83] The Cuban bank sued to recover payment on a shipment of sugar to a US purchaser. The Bank relied on its title to the sugar obtained by expropriation from the original vendor, a Cuban company principally owned by US residents and in receivership. The receiver objected, arguing that the courts ought not recognise (and give effect to) the Cuban expropriation decree. The Bank, as an agent of the Cuban government, claimed the benefit of the act of state doctrine. The Supreme Court agreed, the act of state doctrine being broadly construed to require judicial abstention from considering the validity of a foreign government's taking of property within its own territory. But in so doing, the Court characterised the doctrine as first, a constitutional doctrine reflecting the US separation of powers, and second, as a federal judge-made law—in effect, federal common law.[84] Hence the Constitution's allocation of foreign affairs to the federal level represented an "enclave" where, according to the *Erie* doctrine, federal law, and federal common law in particular, could operate. And as federal law, it would preempt conflicting state law.

It is not necessary to invest heavily in the academic assessment of the two cases, and their implications for customary international law in the US to appreciate their significance to the separation of powers approach herein. The function of *Erie* and *Sabbatino* has been twofold. The first is to drive attention to locate the

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[81] *Erie Railroad v Tompkins*, 78 (per Brandeis J).

[82] Jessup 1939. And see Bradley and Goldsmith 1997a, pp. 827–28.

[83] *Banco Nacional Cuba v Sabbatino* 376 US 398 (1964).

[84] *Banco Nacional Cuba v Sabbatino*, 423–427 (and cited above in Chap. 2.), referring to Jessup "Doctrine".

grant of jurisdiction to the courts to wield customary international law. This reflects in large measure a greater overall attention in the US to holding all and every level of government accountable and responsible for any exercise law-making power. The *Erie* doctrine, as a constitutional precept, represents the foundational question to any exercise of state power in a modern democracy, a matter of continuing concern. Is the power duly and legitimately authorised? In more practical form, the question is whether the right public authority is acting, and that within the limits of its attributed powers.[85] The separation of powers considers both form and function. And in the US there is also superadded a sensitivity to the federal division of powers, between the federal and the state levels.[86] The "anxious scrutiny" for locating a constitutional source of authority in international affairs is reflected, for example, in *Verlinden v Central Bank of Nigeria* in which the FSIA survived a challenge as invalid federal legislation under Article III of the Constitution.[87] The second function of the *Erie* doctrine, and following, is to focus on the nature and operation of customary international law in the domestic legal system. It flows from the continuing concern over the due, constitutional exercise of state power. In short, is customary international law requiring the courts to invade the proper domains of the other branches?[88] Put another way, customary international law may root itself deeply in all aspects of domestic law, but without the constitutional, political, and social controls exercised over domestic law-making. The presence of customary international law in the courts, generated principally by litigation based on the Alien Tort Statute (28 USC §1350) and the Torture Victims Protection Act 1991 (Pub. L. 102–256), has drawn increased scrutiny to international law and its role in the US legal system.[89]

The academic assessment has been framed primary by the works of Professors Bradley and Goldsmith.[90] The core of their position rests upon two premises. The first is that the *Erie* doctrine requires some positive basis in the federal political and legislative branches to authorise the making of federal common law in the circumstances.[91] The *Erie* doctrine does not require an explicit direction, but merely an understanding the matter is "governed by the Federal Constitution or by acts of Congress".[92] This could include a treaty. The problem is "determining

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[85] See, e.g., *US v Yousef* 327 F 3d 56 (2nd Cir 2003) 103; and see also Merrill 1985.

[86] See, e.g., Brilmayer 1994.

[87] *Verlinden v Central Bank of Nigeria* 461 US 480 (1983) (and reaffirming *Sabbatino*).

[88] See, e.g., the essays in Symposium 1992.

[89] Alien Tort Statute, 28 USC §1350, and the Torture Victims Protection Act 1991, Pub. L. 102–256, codified under 28 USC §1350, and allowing actions pursuant to it under the ATS.

[90] Bradley and Goldsmith 1997a, Bradley and Goldsmith 1997b, Bradley and Goldsmith 1998, and most recently, Bradley et al. 2007. And see the review and consideration of their position, and objections there to in Young 2002.

[91] See, e.g., Bradley and Goldsmith 1997a, p. 852ff, Bradley and Goldsmith 1998, p. 2269ff, and Bradley et al. 2007, pp. 886, 902ff.

[92] Bradley and Goldsmith 1998, pp. 2260, 2269ff, taking issue with Koh's representation in 1998, p. 1828 of their position.

where legitimate federal common law-making authorised by the political branches ends and illegitimate federal common law-making begins."[93] For Bradley and Goldsmith, this requires respecting the "interstitial" nature, the "gap-filling" nature of federal common law—Congress remains the principal law-maker—and the current policy orientations in federal laws.[94] The second premise is that the modern conception of customary international law is concerned less with interstate relationships and the treatment of foreign nationals, and more with a comprehensive regulation of a state's treatment of all individuals, its own citizens included.[95] The "core business" of modern customary international law is the protection and enforcement of human rights. This results in modern customary international law having a broader coverage than is ordinarily prescribed for the federal domain. As a result the potential application of modern customary international law triggers an *Erie* doctrine examination of the constitutional basis for the exercise of that power. Bradley and Goldsmith contend that the courts' federal common law power cannot be presumed to extend so far as the new, modern customary international law would reach into the legislative and federal separation of powers.[96] Some further federal authorisation is required.

This outline of *Erie* and modern customary international law defines in large measure the debate.[97] On the one hand, few take issue with their characterisation of the modern conception of customary international law, primarily as human rights oriented.[98] On the other hand, the greatest source of contention is their construction of the *Erie* doctrine. The objections reject their interpretation of *Erie* as establishing a caesura for the introduction of customary international law pre- and post-*Erie* (and further emphasised by the changed nature and objectives of customary international law). They argue that *Erie* does not require henceforth identifiable federal jurisdictional bases for customary international law. It remains automatically incorporated and enforceable as federal law, just the same way as it was incorporated before the *Erie* decision.[99] To this end, they adduce arguments based on the intention of the Framers, pre-*Erie* cases, and interpretations of *Erie.* Accordingly, they also reject the need to condition the domestication of customary international law in accordance, whether as interstitial or in conformity with current policy. This would apply in particular to *ius cogens* and *obligations erga omnes.* And they advance further arguments based on the connections between

[93] Bradley and Goldsmith 1998, p. 2269.

[94] See, e.g., Bradley et al. 2007, pp. 879–80.

[95] Bradley and Goldsmith 1997a, p. 838ff; Bradley et al. 2007, p. 872.

[96] See, e.g., Bradley and Goldsmith 1998, p. 2272ff.

[97] Young 2002 provides an overview and discussion of the competing sides.

[98] See, e.g., Stephens 1997, p. 454ff.

[99] Henkin 1984, p. 1561 (customary international law "self-executing"); Stephens 1997, p. 454ff; Koh 1998, pp. 1828ff, 1840ff; Neuman 1997, p. 376; Young 2002, pp. 485ff, 496 (*Erie* establishing a choice of law rule).

human rights and democratic government, especially in the tradition of the US, as motivation to pursue the incorporation of customary international law.

One signal absence in these claims, rejoinders, and ripostes is a clear statement of the constitutional basis on which customary international law may be incorporated in the first place. What is and is not legitimate federal common law nevertheless assumes in that power (whether pre- or post-*Erie*) some constitutional authorisation for applying customary international law in the first place. Despite the length and breadth of the argumentation, a clear, simple articulation of the rule of recognition is absent. *Sabbatino*, as Henkin points out, would imply the courts' power in the constitutional separation of powers.[100] This works well for the act of state doctrine at issue in *Sabbatino*, the foreign affairs domain, and "old" customary international law. It reflects consistently with the UK position the idea of customary international law as self-limitation to ensure peaceful relations among states. Judicial abstention or deference, reflecting comity and reciprocity among friendly nations, can certainly rest upon these grounds. But this reasoning does not assist, or is too remote, for the modern version of customary international law, and its internal perspective on human rights.

Others have referred to Article 1 of the Constitution, granting Congress the power to "define and punish… Offences against the Law of Nations", and often together with Article III, extending the judicial power to "all cases affecting ambassadors, other public ministers and consuls;…to all cases of admiralty and maritime jurisdiction".[101] With respect, however, the language of the clause in no way supports the automatic or presumptive incorporation of customary international law, either the old or new versions. Nor does its drafting history.[102] Forcing the language seems a sterile route of argument to produce any fruitful rule of recognition.

Article 1 does, however, clearly justify the ATS, and other potential statutory forms of incorporating customary international law.[103] Indeed, much of what might count for "old" customary international law has been codified or dealt with in congressional statutes. But of course, statutory incorporation by reference provides a clear separation of powers rule for applying customary international law. It would end debate on the liminal question of how customary international law may enter a legal system, and track further analysis of the application of international law along the lines of treaties. Even the interaction among such statutes would be governed by domestic law, and domestic constitutional considerations.

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[100] Henkin 1996, p. 139.

[101] Paust 1983, Paust 1988a, and Paust 1990; Lobel 1985, p. 1130ff; see also Ku 2005, and Kent 2007 (an historical analysis of the constitutional article).

[102] Kent 2007, p. 931ff.

[103] As perhaps in *Hamdan v Rumsfeld* 548 US 557 (2006) (UCMJ qualified by the "laws and customs of war"); or the Foreign Sovereign Immunities Act 28 USC 1604ff; and see Bradley et al. 2007, p. 919ff for further examples.

4.4.2 Ruling Recognition

Indeed, it is the ATS which has generated the fuel to maintain the academic fires burning. The ATS (28 USC 1350) dates from 1789, and reads simply, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[104] The provision lay dormant until 1980, and the federal appeal decision of *Filartiga v Pena-Irala.*[105] The decision activated a substantial body of litigation in the US in which foreigners launched damage claims against foreign state agents, based upon violations of human rights. In this fashion, the ATS served as the main portal in which the "modern" version of customary international law gained entry to the US legal system (and thus became the Trojan horse for the wider problems identified by Bradley and Goldsmith[106]). In other words, the statute authorised the federal courts to consider and determine civil claims based on customary international law. Here was definitive authorisation for an active judicial consideration of customary international law. Together with the quantity of litigation the ATS spawned, came an equally large component of commentary addressing the divergent interpretations of the ATS. Most prominent among both was the uncertainty whether the ATS merely conferred jurisdiction on the federal courts, without further allowing them to stipulate a concrete cause of action sounding in customary international law, or whether they did have the power to frame causes of action and provide remedies therefore, even if those resembled but remotely what would have been ordinarily understood to constitute a "tort… committed in violation of the law of nations" at the time.[107] Moreover, should those claims reflect the evolution of customary international law or as it stood in the eighteenth century?[108] In addition, and following, the courts also had to grapple with the other ordinary questions of tort law, such as remoteness of damage, aiding and abetting the commission of a tort, and so on, and some relating to international law.[109] The domestic character of the customary international law litigation under the ATS is also confirmed by the application of the FSIA to claims based on the ATS. In other words, sovereign immunity applies to bar claims against states and duly authorised

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[104] Kent 2007 examines its drafting history; and see Randall 1985; Sweeny 1995 ("tort" referring to law of prize).

[105] *Filartiga v Pena–Irala* 630 F.2d 876 (2nd Cir. 1980) construing the section as a grant of jurisdiction to the federal courts to hear the claims of Filartiga arising from the torture and murder of her brother by Pena–Irala, a Paraguayan police official.

[106] Bradley and Goldsmith 1997a, p. 831ff.

[107] See, e.g., *Tel–oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir. 1984); thus Sweeny 1995.

[108] *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995) (claims to track evolution of customary international law; *inter alia,* no state immunity for leader of unrecognised rebel entity).

[109] See, e.g., *Kadic v Karadzic*; *Presbyterian Church of Sudan v Talisman Energy* 582 F 3d 244 (2nd 2009) (aiding and abetting in international law, corporate liability); *Wiwa v Royal Dutch Petroleum* 226 F 3d 88 (2nd Cir 2000); *Khulumani v Barclay Nat'l Bank* 504 F 3d 254 (2nd 2007).

state agents in accordance with the provisions of the FSIA, even where the ATS claims a violation of *ius cogens*.[110]

The *Sosa v Alvarez-Machain* decision of the Supreme Court confirms this domestic framework.[111] Apart from its implications regarding the *Erie* doctrine, *Sosa* also emphasised that the statutory incorporation of the "Law of Nations" did not result in a wholesale, unqualified transposition of customary international law.

> In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.
>
> … Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.[112]

The four reasons given by the Court go to the core of the separation of powers.[113] The first is the modern US restraint in judicially applying common law, in particular internationally generated norms, given the realisation that this is active law-making. The second is the revised role held by the federal courts after *Erie*, where "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[114] Third, the creation of private rights of action are better left in general to the legislature. Lastly, the ramifications on the foreign position and policy of the US counsels judicial caution not to invade the discretion of the Legislative and Political Branches.

4.4.3 And the Rule?

Where all this leaves us is, is without any express source of general jurisdiction for the US courts to apply customary international law outside statutory enactments, or the *Sabbatino* considerations regarding foreign policy. Both, to be sure, are excellent, sound bases from the optic of the separation of powers. But they do not

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[110] *Argentine Republic v Amerada Hess Shipping* 488 US 428 (1989) (state) and *Matar v Dichter* 500 F Supp 2d 284 (Dist NY 2007) (immunity for former head of Israeli secret service in class action under ATS and TVPA for war crimes).

[111] *Sosa v Alvarez–Machain* 542 US 692 (2004); see also Bradley et al. 2007, p. 892ff; Koh 2004; Note 2006 (case note on *Sosa*); Flaherty 2004, and Panel 2007.

[112] *Sosa v Alvarez–Machain* 724–725 (per Souter J for the court).

[113] Hence, the due sense of triumph in Bradley et al. 2007.

[114] *Sosa v Alvarez–Machain* 726 (per Souter J for the court).